

NH-933

DOCKET NO. NHH-CV19-5003875-S : SUPERIOR COURT
NYRIEL SMITH
MUHAWENIMANA SARA : JUDICIAL DISTRICT OF NEW HAVEN
v. : HOUSING SESSION
CITY OF NEW HAVEN, ET AL. : JUNE 17, 2019

MEMORANDUM OF DECISION

INTRODUCTION:

The plaintiffs are two children under the age of six who have elevated blood levels of lead. This matter is brought by parents of the two children on their behalf. Plaintiff Nyriel Smith has a high blood lead level of about eleven micrograms per deciliter. Plaintiff Muhawenimana Sara has a high blood lead level of about ten micrograms per deciliter. The plaintiffs have challenged the manner in which the City of New Haven has dealt with their condition and the source of it. The plaintiffs contend that the City of New Haven has violated state law and its own local ordinances in its failure to properly protect the children. The defendants contend that their actions have been appropriate and consistent with applicable law.

PROCEDURAL HISTORY:

This matter was brought by means of a verified complaint and an application for temporary injunction. The complaint contains allegations directed to a class action, and the plaintiffs have requested that the court certify a class, however, that issue has not yet been fully

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briefed and has not yet been addressed by the court. This matter was removed to federal district court but promptly remanded by that court to this court. This court then held a temporary injunction hearing on June 7, 2019. At the end of the hearing, the court requested that the parties brief the legal issues, with briefs to be filed by the end of the day on June 13, 2019.

FINDINGS OF FACT:

Based upon the evidence presented at the temporary injunction hearing, the court finds that the following facts were established for purposes of this application for a temporary injunction:¹

1. Plaintiff Smith lives at 105 Lombard Street, Second Floor, New Haven ("Smith Premises"), and has lived there since March 2018.
2. At the time that she moved into the Smith Premises, the blood lead level of Plaintiff Smith was normal. It is now abnormal.
3. The Smith Premises has chipping and flaking paint.

¹ To obtain a temporary injunction, it is the plaintiffs' burden to prove by a preponderance of the evidence: "(1) the plaintiff ha[s] no adequate legal remedy; (2) the plaintiff would suffer irreparable injury absent [the injunction]; (3) the plaintiff [is] likely to prevail . . . and (4) the balance of the equities favor[s] the issuance of the injunction."

Waterbury Teachers Assn. v. Freedom of Information Commission, 230 Conn. 441, 446, 645 A.2d 978 (1994).

4. The Smith Premises was built prior to 1978, when paint containing lead was widely used.
5. Since July 2018, Plaintiff Smith has tested positive for elevated blood lead levels. The test in July 2018 revealed a blood lead level of eight micrograms per deciliter. The most recent test in February 2019 revealed a blood lead level of eleven micrograms per deciliter.
6. Plaintiff Smith has had at least four elevated blood level tests since moving into the Smith Premises.
7. Plaintiff Smith's blood lead levels have been promptly reported to the Connecticut and New Haven departments of health.
8. Plaintiff Sara lives at 187 Wolcott Street, First Floor, New Haven ("Sara Premises"), and has lived there since November 2016.
9. The Sara Premises has chipping and flaking paint.
10. The Sara Premises was built prior to 1978, when paint containing lead was widely used.
11. Since February 2018, Plaintiff Sara has tested positive for elevated blood lead levels. The test in February 2018 revealed a blood lead level of eight micrograms per deciliter. The most recent test in April 2019 revealed a blood lead level of ten micrograms per deciliter. Plaintiff Sara's blood lead level is now abnormal.
12. Plaintiff Sara has had at least five elevated blood lead level tests since moving into the Sara Premises.

13. Plaintiff Sara's blood lead levels have been promptly reported to the Connecticut and New Haven departments of health.
14. Both plaintiffs are under the age of six.
15. The parents of both plaintiffs convincingly testified that they have observed what they consider to be unusual deficiencies in each child's mental proficiency and development based upon the child's age.
16. Neither plaintiff has received a test result indicating that their blood lead levels were twenty micrograms per deciliter or higher.
17. Neither plaintiff has received a test result indicating that their blood lead levels were fifteen micrograms per deciliter or higher.
18. The defendants have not provided Plaintiff Smith with the information required by General Statutes § 19a-110 (d).
19. The defendants have not conducted an epidemiological investigation of the source of lead, or any other substantive investigation of the source of lead, for either plaintiff.
20. The defendants have not taken any substantive action to mitigate or lessen the elevated and increasing blood lead levels of either plaintiff.
21. Defendant Byron Kennedy is the director of the New Haven Health Department.
22. From some time in 2013 until about November 2018, the New Haven Health Department regularly conducted complete lead investigations and ordered abatements of sources

found when any child under the age of six was found to have blood lead levels of five micrograms per deciliter or higher.

23. In November 2018, for budgetary and resource reasons, the New Haven Health Department changed their practice such that they no longer conduct lead investigations or order abatements for any child under the age of six unless the child's blood lead level is reported as twenty micrograms per deciliter or higher.
24. The New Haven Health Department initially opened files on each plaintiff when they received reports of elevated blood lead levels and initially intended to conduct lead source investigations. However when the practice of the department was changed in November 2018, the department closed their files on each plaintiff without conducting any investigation or taking any substantive steps to mitigate the elevated blood lead levels.
25. No level of lead in human blood is safe. The Centers For Disease Control and Prevention ("CDC") has, since 2012, determined and published that an abnormal or elevated blood lead level for children under age six is any level that is five micrograms per deciliter or higher.
26. Elevated blood lead levels in children, particularly children under the age of six, substantially increase the chances of developing significant health issues, including retarding the child's mental and physical development. The damage caused can be permanent.

27. The presence of cracking and/or peeling lead paint in or about the residence of young children creates a health hazard for them.
28. The CDC has determined that a blood lead level in excess of five micrograms per deciliter of whole blood is abnormal for children under age six.
29. Blood lead level is a measure of the body burden of lead.
30. The CDC makes its recommendations based upon blood lead level. The CDC does not make lead body burden determinations for any body tissue other than blood.
31. The normal means of measuring lead poisoning in humans, and the normal criteria for making medical decisions concerning lead poisoning, is blood lead level.
32. Although lead can also be measured in other tissues of the body, the CDC currently defines an abnormal body burden of lead for children under age six to be a body that contains five micrograms or more of lead per deciliter of whole blood.
33. Prior to November 2018, the New Haven Health Department's practice generally tracked the blood lead level determinations by the CDC in that, prior to November 2018, the New Haven Health Department generally conducted lead source investigations and issued abatement orders when a child's blood lead level met or exceeded the CDC's then applicable determination for abnormal blood lead level, which the CDC has reduced over time.

ANALYSIS:

Applicable Connecticut statutes, regulations, and local ordinances provide for a series of obligations on the local health departments that are triggered by specified blood lead levels. All local health departments must comply with the applicable Connecticut statutes, though each city may apply more stringent standards if they choose to. The obligations cover four basic areas. At the lowest levels, the provision of information concerning lead poisoning is required. Then, at various levels, studies, issuance of abatement orders, and mitigation efforts can be required. See Regs., Conn. State Agencies § 19a-111-3. The local departments of health are primarily obligated with the foregoing requirements. Id., § 19a-111-3. Connecticut medical laboratories are required to report elevated blood lead level tests to the Department of Public Health, who then reports the results on to the local departments of health. See General Statutes §§ 19a-110 (a)-(b), (d).

Section 19a-110 (d) requires that the local director of health provide the parent or guardian of any child known to have blood lead levels of five micrograms per deciliter or more with specific information describing the dangers of lead poisoning, means of mitigation, and services available. Section 19a-110 (d) further requires that the local health director conduct an on-site lead source investigation for any child who has had two tests, at least three months apart, with results between fifteen and twenty micrograms per deciliter, and order remediation of any source identified.

General Statutes § 19a-111 requires the local health director to conduct, or cause to be conducted, an epidemiological study of the source of lead and order abatement of any source found in the case where a person's blood lead level is reported as twenty micrograms per deciliter or higher. Section 19a-111 continues that, in cases where abatement cannot be accomplished in a reasonable time, the local health director may be required to relocate the family impacted. Finally, on the state level, General Statutes § 19a-111c (a) requires any owner of premises where toxic levels of lead have been found and children under the age of six reside to remediate such toxic sources of lead.

New Haven Ordinance § 16-61 (g) defines lead poisoning as "a blood lead concentration equal to or greater than twenty (20) micrograms per deciliter of whole blood, or any other abnormal body burden of lead as defined by the Centers for Disease Control and Prevention." The court finds that the reference in this ordinance to "any other abnormal body burden of lead as defined by the Centers for Disease Control and Prevention" includes a blood lead level of five micrograms or more per deciliter for children under age six. As such, a child under age six who has a blood lead level of at least five micrograms per deciliter meets the definition of lead poisoning under New Haven Ordinance § 16-61 (g). Further, the definition of "blood poisoning" necessarily carries with it the concept of health hazard.

This ordinance was adopted decades ago when the CDC's determination of abnormal blood lead level was higher than it is today. The CDC has decreased its determination of abnormal blood lead level over the years based upon further studies and understanding of the

hazards posed. The definition of lead poisoning here was apparently meant to explicitly set the level of lead in the blood which was understood as hazardous at the time, but then also allowed the definition to automatically update itself as the CDC determinations became more refined over time. The CDC only makes specific determinations concerning blood lead level and does not make specific determinations for abnormal lead levels in any body tissue other than blood. The practice of the New Haven Health Department prior to November 2018 confirms this understanding of the ordinance. Prior Superior Court interpretations of this ordinance also confirm this meaning.

New Haven Ordinance § 16-64 provides:

Where the director of public health (hereinafter the “director”) finds any of the following he shall issue an order to the owner of the premises² or the occupant of any dwelling unit therein who possesses hazardous personal property² to eliminate the hazard in accordance with methods prescribed in section 56-65:

- (1) That the presence of lead paint upon or in any premises creates a health hazard to children.
- (2) **The presence of lead-based paint in a dwelling unit of a child with lead poisoning, as defined in section 16-61²** in the dwelling unit of a

² The court believes that commas are missing in these places, and has read the ordinance as if commas were present here. Without the insertion of the commas, the ordinance is grammatically incorrect and is unclear. Even with the commas in place, subsection 2 of this ordinance is poorly drafted with conditions that overlap each other. However, the court sees no other comprehensible reading of this ordinance.

child whose blood lead is twenty five (25) micrograms or more per one (1) deciliter of whole blood, or any other dwelling unit in the same building (including all staircases, hallways and porches);

- (3) **That the presence of cracked, chipped, blistered, flaking, loose or peeling paint constitutes a health hazard.**

(Emphasis added.)

New Haven Ordinance § 16-65 (a) provides in relevant part:

Where the director determines that the presence of lead paint upon any interior or exterior premises creates a health hazard to children, **he shall** issue an order to the owner to eliminate the hazard.

(Emphasis added.)

In the present case, both plaintiffs satisfy the conditions of § 19a-110 (d), such that the New Haven director of health was required to provide the parents of each with the lead poisoning information specified in that statute. The local director did not provide the parents of Plaintiff Smith with the required information.

Both plaintiffs satisfy the definition of lead poisoning under New Haven Ordinance § 16-61 (g) in that both plaintiffs have an abnormal body burden of lead as defined by the CDC as five micrograms or more of lead per deciliter of blood in a child under age six. The relevant information was provided to the New Haven Health Department. As a result, under New Haven Ordinance § 16-64, the New Haven director of health was required to issue an order to the owners of the Smith Premises and the Sara Premises to abate any lead poisoning hazard there. In this regard, both plaintiffs have repeatedly tested positive for blood lead levels in excess of five

micrograms per deciliter, and both have now exceeded ten micrograms per deciliter. Further, Plaintiff Smith had normal blood lead levels before moving to the Smith Premises, and the blood lead levels of both plaintiffs have now increased over time while residing at their respective premises. Lastly, both premises were built prior to 1978, when the use of lead-based paint was prevalent, and both premises have chipping and peeling paint. As such, New Haven Ordinance § 16-64 requires the New Haven director of health to order abatement of any lead hazards on each premises.

New Haven Ordinance §§ 16-66 (e)–(g) authorize the director of health to directly take over certain lead hazard abatement projects, but do not require him to do so. As such, these provisions provide authority to act, but not an obligation to do so.

The court understands that it is the court's duty to interpret and ensure the proper application of relevant law to the facts at hand in the dispute. In doing so, the court should take care not to overstep into the responsibilities of other branches of government. The court also understands that it should be cautious in ordering other branches of government to do or refrain from doing things, and normally the court will refrain from interfering with decisions of other branches of government, provided those decisions are made using appropriate procedure and authority and are applied consistent with applicable law. However, the court is the arbiter of the meaning and application of enacted law.

Here, enacted state law, namely § 19a-110 (d), required that the New Haven director of health provide both plaintiffs with specified lead poisoning information. The New Haven

director did not execute that obligation with regard to Plaintiff Smith. Further, local New Haven Ordinance §§ 16-61 (g) and 16-64 required the New Haven director of health to issue abatement orders to the owners of the premises where each plaintiff resides. He has not done so. The New Haven director of health has, as of November 2018, changed the policy of the department such that the department no longer conducts lead investigations or issues abatement orders unless children under the age of six are reported with blood lead levels in excess of 20 micrograms per deciliter. This change is inconsistent with applicable New Haven Ordinance §§ 16-61 (g) and 16-64.³ Although the New Haven Director of Health has leeway in changing policy at his department, any policy change must be consistent with applicable state law and local ordinance.⁴

³ Although not applicable under the facts of this case, the change is also potentially inconsistent with General Statutes § 19a-110 (d), which would require lead inspections in cases where children report blood lead levels of 15 micrograms per deciliter in two tests taken three months apart.

⁴ The New Haven ordinances are more stringent than the state statutes. However, given the ordinances, the New Haven Health Department must comply with them. If New Haven wishes to change the department's obligation, they can do so by changing the ordinances, provided the changes are consistent with applicable Connecticut statutes. A departmental policy change cannot be used to change department practices beyond the confines of the applicable statutes and ordinances.

Policy and practice must be subservient to applicable statute and ordinance. Such was not the case under the circumstances of these two plaintiffs.

The court finds that the plaintiffs have born their burden of proof. Irreparable harm is apparent given the findings of elevated blood lead levels and the physical and mental injuries that may result from elevated blood lead levels. The plaintiffs reside in premises built before 1978 with chipping and peeling paint. Unless sources of lead poisoning are abated, the plaintiffs will likely maintain or increase the level of lead in their blood as they have now done for more than a year. Absent a court order, the New Haven Health Department has declined to take action to issue abatement orders, which are necessary to protect the health of the plaintiffs and are required by applicable New Haven ordinance. The equities tip decidedly in favor of the plaintiffs because the court is merely ordering compliance with existing New Haven ordinances which have now been properly interpreted and applied to the facts of this case by the court. The City of New Haven remains in control and may change its ordinances at any time provided the changes are consistent with state law. The plaintiffs are likely to prevail on the merits of the orders entered.

The court here has limited its orders to the city itself and the health director since those are the entities directly implicated by the statute and the ordinance. The orders are squarely focused on the existing obligations of the city and the health director and do not impinge upon the rights of any third parties. The court has also limited its orders to require compliance with the statute and the ordinance properly interpreted and applied. In doing so the court rejects the health

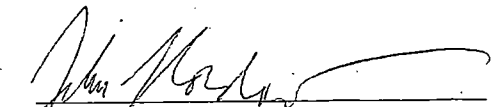
director's recent re-interpretation of the ordinance for the reasons stated herein, even after giving due deference to the administrator's recent unreasonable changed view. The court has considered the city's legitimate objectives of managing resources and costs. However, the city cannot manage resources and costs in derogation of obligations under a state statute and its own ordinance. If the city determines that it must modify its obligations in order to manage resources and costs, the city is free to do so by properly amending the ordinance. The court has studiously avoided substituting its substantive judgments for those of the legislative body, but has instead merely ordered compliance with existing statute and ordinance properly interpreted and applied. The court has also not interfered with the discretionary judgments of the executive, but, as courts do, properly interpreted, applied and required compliance with existing law.

ORDER:

Given the foregoing, the City of New Haven and the Director of the New Haven Health Department are ordered to:

1. Provide the parents of Nyriel Smith with the information required by § 19a-110 (d).
2. Determine, and order abatement of all lead poisoning hazards existing at both 105 Lombard Street, New Haven, and 187 Wolcott Street, New Haven, by their respective owners, as required by New Haven Ordinance § 16-64.

*Memorandum of Decision
mailed to counsel of record:*


John L. Cordani, Judge

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*On this the
17th day of June 2019
William C. Pett
Chief Clerk Housing Matters*